IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4695 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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B S HALVADIA - Petitioner(s)
Versus
THE EXECUTIVE ENGINEER(TR) & 1 - Respondent(s)

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Appearance :

MR KISHOR M PAUL for Petitioner(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1 - 2.
MS MANISHA LAVKUMAR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 17/12/2007

ORAL JUDGMENT

1. Rule. Ms.Manisha Lavkumar, learned Counsel waives service of notice of Rule for Respondent

No.1 and with the consent of the learned Counsel appearing for both the sides, the matter is finally heard today.

2. The short facts of the case appear to be that the petitioner joined the service on 6.3.1979 and in the year 1997 the petitioner was granted grade of Rs.3400-8300. On 29.7.2004, the then respondent Board introduced GSO 334 providing various yardsticks and eligibility criteria for conferring the benefits of higher pay-scale. On 13.7.2006, the respondent Board passed the order for recovery of the higher pay-sale granted to the petitioner being the difference between the pay-scale to which the petitioner was entitled of Rs.3200-6905 and the pay-scale granted to the petitioner of Rs.3400-8300. The petitioner retired from service on 31.7.2006 upon reaching the age of superannuation. Initially the petitioner served notice to the respondent Board and thereafter the petitioner preferred Special Civil Application No.3884 of 2006. This Court (Coram: H.K.Rathod, J.) vide order dated 22.11.2006 directed for making representation

and such representation was to be considered. It appears that thereafter the petitioner did make representation, which has been decided vide order dated 6.2.2007 and it is decided that the petitioner is not eligible for second higher pay-scale of Rs.3400-8300 w.e.f. 21.5.1998. It is under these circumstances, the present petition.

3. I have heard Mr.Paul, learned Counsel for the petitioner and Ms.Manisha Lavkumar, learned Counsel for the respondent.

4. The matter can be segregated into two parts; one is for the entitlement of the petitioner to get pay-scale of Rs.3400-8300 and the second is for the effect of the higher pay-scale already granted to the petitioner and the consequential effect on the recovery.

5. It does appear from GSO 334 dated July 29, 2004 that the category of the persons, who are working as watchman, gardner, guest house attendant, dispensary and hospital attendant would be covered by Clause-13 of GSO, which reads as under:-

"13.**Next HG to some of the categories**: Keeping the above principles in mind, some of the categories like Watchman, Gardner, Guest House Attendant, Dispensary & Hospital Attendant, shall be granted next higher scale in the following manner.

If not passed SSC

	Higher Scale
On completion of 9 years	3050 - 5985
On completion of 19 years	3200 - 6905
On completion of 30 years	3400 - 8300

If passed SSC

	Higher Scale
On completion of 9 years	3050 - 5985
On completion of 19 years	3400 - 8300
On completion of 30 years	4000 - 10025

6. It is an admitted position that the petitioner has not passed SSC and, therefore, on a plain and simple reading the petitioner would be eligible to get higher pay-scale of Rs.3200-6905 and not of Rs.3400-8300, which is available to the persons, who have passed SSC.

7. Mr.Paul, learned Counsel appearing for the petitioner by relying upon Clause-9 of GSO 334,

however, contended that as per the said clause, the qualification may make difference, if the services are joined after 10.7.1990 and not prior thereto. He submitted that the petitioner has joined the services prior to 10.7.1990 and, therefore, it is not necessary to meet with the requisite qualification criteria as per Clause-9 and, therefore, he submitted that if such qualification is excluded, then in that case, the petitioner was rightly given the pay-scale Rs.3400-8300. Therefore, he submitted that the interpretation of the requisite qualification as per GSO 334 is erroneous on the part of the respondent.

8. Clause-9 of GSO 334 reads as under:-

> "9. **Qualifications:** Those employees who have joined after issuance of GSO 315 i.e. did 10.7.1990, the employees shall be eligible to receive higher grade only if they possess the requisite qualification under GSO 315. Whereas those employees who have joined the Board before issuance of GSO 315 i.e. before 10.7.1990 in those cases the

criteria of qualification prevailing at relevant time shall be made applicable for granting benefit under this new 3 tier HG Scheme. However, such of the employees shall give an undertaking that if Higher Grade is given, they shall not claim for absorption."

9. It is apparent that the qualification as referred to in Clause-9 has relevancy for the employees, who are to be considered for the benefits vide GSO 315 dated 10.7.1990. It is not in dispute that GSO 315 dated 10.7.1990 is pertaining to the technical staff of the Board and the petitioner is not falling in the category of technical staff who are covered by GSO 315 dated 10.7.1990. Therefore, when specifically express clause is made for the category of the persons like watchman, gardner, etc., to which the petitioner belongs, there is no reason to apply Clause-9 of GSO 334 as against express Clause-13 of GSO 334. Even otherwise also when a specific clause is provided for a specific category of the

employee/staff, other provisions may not apply.

10. Therefore, in view of the above, it can be said that vide GSO 334 dated 29.7.2004, the petitioner would not be entitled to the higher pay-scale of Rs.3400-8300, but would be entitled to the benefits of higher pay-scale of Rs.3200-6905.

11. However, it appears that in the present case the higher pay-scale came to be granted to the petitioner in the year 1997 and in view of GSO 334 vide order dated 13.7.2006 the recovery is proposed to be made of the difference of the amount by giving effect from 8.5.1998. It is not the case of the respondent authority that on account of any fraud or malpractice played by the petitioner, higher pay-scale came to be granted. It is by now well settled that if the higher pay-scale has been granted by mistake, for which no malafide or fraud can be attributed to the employee concerned, the recovery cannot be effected of the payment already made, merely because subsequently the view taken by the authority is that the employee was entitled to

the lower scale than the scale which has been granted. The reference may be made to the decision of this Court in case of **N.H.Mehta v. State Government & Anr., reported in 2001(2) GLH, 190.** Therefore, the respondents would not be justified in affecting the recovery prior to 13.7.2006. If the matter matter is considered for giving prospective effect, the petitioner has retired on 31.7.2006 in the same month of July 2006 and, therefore, at the most, the effect may be given in the month of July 2006 and if any excess payment is made, the recovery may be affected for that period. In the same manner, for payment of the retiral dues to the petitioner the effect shall be that the petitioner was entitled to the pay-scale of Rs.3200-6905 and not Rs.3400-8300. It will be for the respondent authority to consider the matter accordingly and to pass consequential order.

12. In view of the above, the petition is partly allowed to the aforesaid extent. Rule made absolute accordingly. No order as to costs.

17.12.2007 **(Jayant Patel, J.)**

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